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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 404

MEXICAN LIGHT & POWER COMPANY, LTD.,
Petitioner,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS AND BRIEF IN SUPPORT THEREOF.

CARL G. STEARNS,
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Counsel for Petitioner.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Mexican Light & Power Company, Ltd., a Canadian corporation, for a writ of certiorari to review the judgment of the Supreme Court of Texas entered in the above case on April 17, 1946 (Motion for Rehearing overruled May 15, 1946), which judgment reverses a judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, dated October 31, 1945, granting the relief sought by petitioner, respectfully shows:

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 of the Judicial Code, as amended by the Act of Febru-

ary 13, 1925, Ch. 229, Sec. 1, 43 Stat. 937 (U. S. C. A., Title 28, Sec. 344(b)).

The date of the judgment in the trial court, which was adverse to petitioner, was April 4, 1945 (R. 26). Appeal was duly perfected to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, which court on October 31, 1945, reversed the judgment of the trial court and rendered judgment in favor of petitioner (R. 55). Respondent's petition for writ of error was granted by the Supreme Court of Texas, which entered judgment on April 17, 1946, reversing the judgment of the Court of Civil Appeals and affirming the judgment of the trial court (R. 110). The judgment of the Supreme Court of Texas became final on May 15, 1946, the date of the entry of its order overruling petitioner's motion for rehearing (R. 114).

The judgment of the trial court, the judgment and opinion of the Court of Civil Appeals and the judgment and opinion of the Supreme Court of Texas are included in the Record certified by the Clerk of the Supreme Court of Texas. This petition was duly filed in this Court within three months after May 15, 1946.

Statement of the Case

This is a suit by petitioner for damages suffered by it resulting from the derailment of freight cars upon which certain property of petitioner was being transported within the Republic of Mexico, over the lines of National Railways of Mexico. Petitioner seeks to establish the liability of respondent as the initial carrier of the shipment involved, within the meaning of the provisions of the Carmack and Cummings Amendments to the Transportation Act (49 U. S. C. A., Sec. 20, (11)), upon a bill of lading dated September 29, 1934, issued by respondent to one Fausto Trevino, petitioner's agent (R. 8A).

In the trial court the case was tried upon stipulations of the parties (R. 30-48). Thus, questions of law only are involved.

The undisputed facts, established by the stipulations, are most clearly stated in the opinion of the Court of Civil Appeals:

> "On September 20, 1934, Westinghouse Electric and Manufacturing Company delivered three specially built electric transformers and parts to the Pennsylvania Railroad Company for shipment to Laredo, Texas. This equipment had been purchased by appellant (petitioner here) and in the bill of lading issued by the Pennsylvania Railroad Company, said property was consigned to the Mexican Light & Power Company in care of Fausto Trevino, Customs Agent at Laredo, Texas. These transformers, etc., were loaded upon two Pennsylvania flat cars and transported over the lines of the Pennsylvania Railroad Company, Missouri-Kansas and Texas Ry. Co., Southern Pacific Lines, and The Texas-Mexican Railway Company to the freight yards of the latter railway company at Laredo, Texas.
>
> "While the cars loaded with appellant's property were waiting in the freight yards of the appellee (respondent here) at Laredo, said railway company issued to Fausto Trevino, appellant's agent, the document sued upon in this action. This instrument is dated September 29, 1934, and by it The Texas-Mexican Railway Company acknowledged receipt of the electrical equipment here involved, and agreed 'to carry (the property received) to its usual place of delivery at said destination, if on its own road or its own water line, otherwise to deliver to another carrier on the route to said destination,'
>
> "The shipment was consigned to Mexican Light & Power Company, Ltd., destination, El Oro, State of Mexico; route, via Acambaro.
>
> "The disputed instrument was made out upon a form prepared for a domestic straight bill of lading. The

receipt clause states that the property to be shipped is 'Received subject to the classifications and tariffs in effect on the date of the issue of this Bill of Lading.' No rates or charges for carriage are set forth in the instrument which does, however, contain the following direction, set forth over the name of the consignor, Fausto Trevino, viz: 'The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.'

"After the instrument above described had been issued and delivered, the appellee moved the cars laden with appellant's property from its yards in Laredo to the middle of the International Bridge over the Rio Grande. Here the cars were picked up by the Mexican carrier and transported to the interior of Mexico, where a derailment occurred with resultant damage to appellant's property. This damage occurred on October 10, 1934.

"Appellant made claim for damages against the Mexican carrier, which was rejected. Suits were then filed against the Pennsylvania Railroad Company and The Texas-Mexican Railway Company, upon the apparently alternative theories, (1) that the Pennsylvania was an initial carrier under the Sharon bill of lading, and (2) that The Texas-Mexican Railway Company was the initial carrier under the Laredo bill of lading.

"The action against the Pennsylvania was tried first and resulted in a judgment in favor of the carrier. Mexican Light & Power Company *v.* Pennsylvania R. Co. (District Court, Eastern District of Pa.), 33 Fed. Supp. 483.

"The Federal District Court held that the Sharon bill of lading issued by the Pennsylvania was not a through bill of lading to El Oro, Mexico, although it contained the notation, 'For export to: El Oro, Estado de Mexico, via Acambaro, via Laredo.' The court further held that under the Carmack Amendment, as amended by the first Cummings Amendment, a carrier receiving property at a point within the United States for shipment to a point within an adjacent foreign country was not required by law to issue a 'through

bill of lading.' (For a statement of the history of the Carmack Amendment and various amendments thereto, see Ann. 49 U. S. C. A., Sec. 20, (11), p. 89; also Alwine *v.* Pennsylvania R. Co., —— Pa. ——, 15 Atl. 2d 507).

"Under the above holding, it is apparent that the Texas-Mexican Ry Co. was under no legal obligation to issue a through bill to El Oro, Mexico. It appears from the stipulations that the proportionate part of the export freight rates charged and paid by appellant under the Sharon bill of lading was in payment for transportation to the international boundary line. Appellee could have taken a receipt for the property at this point and not issued a bill of lading calling for further shipment to a point within an adjacent foreign country over the lines of a foreign connecting carrier.

"However, appellee did not chose to follow this seemingly permissible procedure. It issued an instrument which purports to be a through bill of lading and which clearly imports an obligation on the part of appellant to pay charges for transporting its property to El Oro, Mexico" (R. 50-51).

The consideration paid by petitioner to respondent amounting to $248.70, was a proportion of 15.02% of the export rate from Sharon, Pennsylvania, and respondent stipulated that this payment represented compensation not only for transporting the shipment from Alice, Texas, to Laredo, Texas, but also for deliverying the shipment at the international boundary line between United States and the Republic of Mexico (R. 43).

Throughout the entire course of the litigation respondent urged, as its defenses:

1. That the bill of lading issued by respondent was not intended to be a through bill of lading, but that it was merely intended to be a receipt given by respondent to evidence its obligation to place the shipment at the international boundary line for delivery to the National Railways of Mexico;

2. That if the instrument actually is a through bill of lading, it is unsupported by consideration and is unenforceable;

3. That if the instrument is a through bill of lading, it is illegal and void as violative of Title 49 U. S. C. A., Section 6 (1), (4), (5) and (7), which relate to the fixing and publication of rates, fares and charges for transportation and the fixing of uniform charges and rates (R. 9-23).

The trial court handed down no findings of fact or conclusions of law but merely rendered judgment in favor of respondent. The Court of Civil Appeals held that the bill of lading issued by respondent and sued on in this case is a through bill of lading from Laredo, Texas, to El Oro, Mexico, that it is supported by a valuable consideration, and that the instrument is not illegal or violative of Section 6 (1), (4), (5) or (7), Title 49 U. S. C. A.

The Supreme Court of Texas, in reversing the judgment of the Court of Civil Appeals, and in affirming that of the trial court, did not pass upon or refer to the questions of whether or not the instrument sued on is a through bill of lading or whether or not it is violative of the provisions of 49 U. S. C. A., Section 6 (1), (4), (5) or (7), but held that it was not supported by consideration, and that, therefore, respondent was not liable under the instrument as an initial carrier within the meaning of the provisions of the controlling statute, 49 U. S. C. A., Section 20 (11).

In support of its holding the Supreme Court of Texas adopted the view that respondent received the shipment for transportation merely as an agent of the Pennsylvania Railroad, at Alice, Texas, under the bill of lading issued by the Pennsylvania Railroad requiring respondent to transport the shipment to the international boundary line, and that the Pennsylvania Railroad bill of lading was not discharged until the shipment reached the international

boundary line on the bridge across the Rio Grande River, and that the entire transportation from Sharon, Pennsylvania to the international boundary line was governed by the Sharon bill of lading and not by the bill of lading issued by respondent in Laredo, Texas.

The bill of lading issued at Sharon, Pennsylvania, by the Pennsylvania Railroad was held, in petitioner's suit against that Railroad (*Mexican Light & Power Co.* v. *Pennsylvania R. Co.*, 33 Fed. Supp. 483) not to be a through bill of lading to El Oro, Mexico, but merely a bill of lading to Laredo, Texas, the terms of which were fulfilled and the obligations thereunder discharged when delivery of the shipment was made to Trevino, petitioner's agent at Laredo.

Thus, under the holding of the Supreme Court of Texas, directly conflicting with the holding of the Federal Court in the Pennsylvania suit, petitioner is without a remedy in this case under either the Pennsylvania bill of lading, or the bill of lading issued by respondent.

Question Presented

The only question presented is whether or not the bill of lading issued by respondent to petitioner's agent, Trevino, at Laredo, Texas, while the cars loaded with petitioner's property were waiting in the freight yards of respondent at Laredo, is a valid, enforceable through bill of lading to El Oro, Mexico, within the meaning of the provisions of 49 U. S. C. A. Section 20(11).

Reasons for Granting the Writ

First Reason: The decision of the Supreme Court of Texas holding that the document sued on is not an enforceable bill of lading within the meaning of the provisions of 49 U. S. C. A., Section 20 (11) because not supported by consideration, and that respondent, therefore, is not liable

under it, although the undisputed stipulated fact is that respondent received actual monetary consideration for its participation in the transportation of the shipment, is a decision construing the Federal statute and deciding a Federal question of substance not heretofore determined by the Supreme Court of the United States.

Second Reason: The decision of the Supreme Court of Texas exempting respondent from its liability under the plain mandatory provisions of the Federal statute involved, is a decision of an important question in conflict with the weight of authority of decisions construing and applying the provisions of the Federal statute.

Third Reason: The Supreme Court of Texas has decided an important question of law which has not been, but should be, settled by this Court. It has construed the provisions of the Federal statute in such a way as to establish a dangerous, far-reaching precedent, if permitted to stand.

Your petitioner presents herewith a brief and citation of authorities.

Prayer

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Texas, commanding that court to certify and send to this Honorable Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the Record and all proceedings in the case numbered on its docket A-813, and entitled The T[illegible]as Mexican Railway Company, Petitioner, vs. Mexica[illegible] & Power Company, Ltd., respondent, and that said judgment of the Supreme Court of Texas may be reversed by this Honorable Court and the judgment of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas sustained;

and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CARL G. STEARNS,
CHAS. W. BELL,
Counsel for Petitioner.

We hereby certify that we have read the foregoing petition, and in our opinion it is well founded and entitled to the favorable consideration of this Honorable Court.

CARL G. STEARNS,
CHAS. W. BELL,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 404

MEXICAN LIGHT & POWER COMPANY, LTD.,
Petitioner,

vs.

THE TEXAS MEXICAN RAILWAY COMPANY,
Respondent

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Under the heading "Statement of the Case" and "Question Presented" in the petition, *ante*, pp. 2-7, is a full statement of the question presented and of the facts so far as material to the consideration of such question, and, in the interest of brevity, the statement is not here repeated.

Argument and Authorities

POINT I

Respondent's Issuance of the Bill of Lading of September 29, 1934, Is Fully Supported by Valuable Consideration

In order to escape liability under the provisions of 49 U. S. C. A., Section 20(11), respondent, in its pleadings in the trial court took the position that, with relation to the

shipment involved, it was merely an "intermediate" carrier and "neither an originating nor delivering carrier of such shipment, either in fact or in contemplation of the Cummings Amendment to the Transportation Act, known as 49 U. S. C. A. Par. 20, Sec. 11" (R. 17).

However, in holding that the bill of lading sued on was not supported by consideration, the Supreme Court of Texas held that respondent, in delivering the shipment to the international boundary line, was acting as a delivering carrier under the Pennsylvania bill of lading (R. 107-8). This holding supports respondent's contention that the money which it was paid for its participation in the shipment was under the Pennsylvania bill of lading, and clearly illustrates the fallacy inherent in the concept that the respondent received the money as a delivering carrier under the Pennsylvania bill of lading when, at the same moment, respondent not only admits, but asserts, that it was not a delivering carrier.

As pointed out in the opinion of the Court of Civil Appeals (R. 52), respondent was paid for transportation to the international boundary line and could not lawfully receive any additional sum of money for transporting the property from its yards in Laredo to such boundary line, in view of the rules and regulations of the Interstate Commerce Commission relating to the establishment of uniform tariffs.

Respondent received monetary payment for its participation in the shipment, including its issuance of its own bill of lading, whether or not its transportation of the shipment from its own yards in Laredo to the international boundary line was performed under its own bill of lading or the Pennsylvania bill of lading. Respondent delivered shipments generally, including the one involved in this case, at the boundary line, under an admitted arrangement

whereby the shipment was to be received by the National Railways of Mexico. Respondent knew that this shipment, which it delivered to the international boundary line, would be taken over by the National Railways of Mexico for delivery to El Oro (R. 32, 45). Respondent was under no obligation to issue a new bill of lading, but, for reasons of its own, did so. Petitioner had no control over this, just as it had no control over the manner in which respondent handled its participation in the shipment, or the fixing of the freight charges paid by it to respondent. Respondent is a common carrier for hire, and was paid as such, for its participation in the transportation of this shipment, however and in whatsoever manner respondent elected to handle its portion of such transportation, including its issuance of the bill of lading sued on.

The holding of the Supreme Court of Texas that respondent's issuance of its bill of lading is not supported by consideration is, we submit, founded upon an erroneous conception of the legal effect of both of the bills of lading upon which this shipment moved. The Supreme Court of Texas held that the Pennsylvania bill of lading, or the "Sharon" bill of lading, as it is often referred to in the Record, controlled the shipment clear to the international boundary line. This holding directly conflicts with the holding of the Pennsylvania Federal Court in petitioner's suit against the Pennsylvania Railroad, wherein the court held that the Sharon bill of lading was "fulfilled and the defendant (Pennsylvania Railroad) discharged from further obligation to transport the goods when it delivered them to Trevino, the plaintiff's agent, at Laredo. This does not constitute a through bill of lading to points in Mexico beyond Laredo" (33 Fed. Supp. 485).

Actually, after respondent had moved the shipment from Alice, Texas, to its yards in Laredo, Texas, and while the

shipment was waiting in its yards at Laredo and before it moved the shipment from its yards to the international boundary line, it issued its own new bill of lading to Trevino, petitioner's agent, in Laredo. At that time the legal effect of the Sharon bill of lading ceased, and from that point on to El Oro, Mexico, the shipment moved on petitioner's bill of lading, and it alone, as no bill of lading was issued by the Mexican Railroad. As pointed out in the opinion of the Court of Civil Appeals, "no contract of carriage was entered into between the appellant (petitioner here) and the Mexican carrier, and none was necessary by reason of the method adopted by appellant (petitioner here), and appellee (respondent here) in effecting arrangements for further transportation of appellant's property to its ultimate destination in Mexico" (R. 52).

In support of its holding relating to claimed want of consideration, the Supreme Court of Texas cites the case of *Missouri, Kansas & Texas Ry. Co.* v. *Ward* (United States Supreme Court, 1916), 244 U. S. 383. In that case a second bill of lading was issued by a connecting carrier to cover a portion of the transportation already entirely covered by a preceding bill of lading issued by the initial carrier. The second bill of lading was sought to be utilized as a defense in the suit on the original bill of lading. This Court very properly held that the first bill of lading governed the entire transportation to the ultimate destination, as its terms plainly provided, and that the second bill of lading was, therefore, not supported by consideration. The very marked distinction between that situation and the instant one is at once apparent. Here, the Sharon bill of lading did not even purport to cover the transportation to the ultimate destination, El Oro, Mexico, but designated the destination under that particular bill of lading as Laredo, Texas. In the Federal suit in Pennsylvania, petitioner sought to hold the Pennsylvania Railroad liable as

initial carrier under the Sharon bill of lading on the theory that it constituted a through bill of lading to El Oro, Mexico, but petitioner's contention in that respect was stricken down by the holding of the court in that case establishing that the destination designated in the Sharon bill of lading as Laredo, Texas, was controlling, and that that bill of lading did not cover the transportation of the shipment from Laredo, Texas to El Oro, Mexico.

It is believed that the failure of the Supreme Court of Texas to apprehend the point just made, and to discern the difference between the facts of the *Ward* case, *Supra*, and the instant case, is one of the principal reasons that it fell into the error of holding that there was no consideration to support the bill of lading sued on.

The Supreme Court of Texas further held that respondent did not receive the "property for transportation" at Laredo, within the meaning of the Federal statute, and in support of such holding cites the case of *Ga. So. & F. Ry. Co.* v. *Tipton Produce Company*, 176 S. E. 89, wherein actually the railroad company sought to be held liable under a bill of lading which it had issued never handled any portion of the shipment, and never even came in physical contact with any part of the shipment. It had merely issued a bill of lading under a standing arrangement or agreement with an associated carrier. That case is clearly not an authority supporting the holding of the Supreme Court of Texas in the instant case, where respondent handled the shipment all the way from Alice, Texas, to the international boundary line, on its own line, and with its own equipment, and through its own employees.

The case of *Panhandle & S. F. RY. Co.* v. *McCrummen*, 240 S. W. 607, cited by the Supreme Court in support of its holding, was a case decided by the Court of Civil Appeals of Texas, at Amarillo, which did not involve the federal statute, but which was decided upon the court's construc-

tion of certain state statutes regulating intrastate commerce, the shipment involved having been wholly within the State of Texas, beginning at Paris, Texas and terminating at Lubbock, Texas. The decision in that case has no bearing whatsoever on the question here presented.

In the case of *Rice* v. *Oregon Short Line RY. Company*, 198 Pac. 161, the court held liable as the initial carrier the defendant, Oregon Short Line Railway Company, which had issued a second bill of lading in the course of transportation of a shipment originating under a prior bill of lading. The court held that all of the obligations of the first bill of lading had terminated, and that the Oregon Short Line Railway Company was the initial carrier under the bill of lading issued by it, and was, as such, liable for damages occurring on the line of the Union Pacific Railway Company, a connecting carrier. The court held:

> "We conclude that liability for damages as an initial carrier depends upon the reception of the goods in one state for transportation to a point in another state or territory, rather than the intention which the shipper may have had at the time of loading the cars, but which does not find expression in some form of a contract, and that where all the obligations of a previous contract of shipment are terminated, and there has been a delivery to the consignee prior to the making of a subsequent contract for shipment into another state, the carrier of the property under the subsequent contract of shipment is the initial carrier under the Carmack Amendment. In this case appellant was the initial carrier. Gulf, C. & S. F. R. Co. *v.* Texas, 204 U. S. 403, 27 Sup. Ct. 360, 51 L. Ed. 540; South Pac. *v.* Ariz., 249 U. S. 472, 39 Sup. Ct. 313, 63 L. Ed. 713. See, also, Chesapeake & O. Ry. Co. *v.* National Bank of Commerce, 122 Va. 471, 95 S. E. 454."

In the instant case, the obligations of the Sharon bill of lading ceased under the holding of the Federal Court

in Pennsylvania upon the arrival of the shipment in Laredo; and the continuation of the shipment from respondent's yards in Laredo clear to El Oro, Mexico, was under respondent's own bill of lading.

In *Louisville & Nashville R. Company* v. *Johnson*, 206 S. W. 638, plaintiffs delivered a shipment of horses and mules to the Southern Pacific Railway Company at Battle Mount, Nevada, to be transported to Mt. Sterling, Kentucky. The Southern Pacific issued a through bill of lading to Mt. Sterling. When the horses and mules reached East St. Louis a new contract of carriage was entered into between the shippers and the Louisville & Nashville Railway Company. The first bill of lading was surrendered at the time the second bill of lading was issued. The Louisville & Nashville Railway Company transported the horses and mules to Howell, Indiana, where they were turned over to the Louisville, Henderson & St. Louis, and the latter railway, together with the Chesapeake & Ohio, transported them to Mt. Sterling, Kentucky, the destination. The freight charges on the entire shipment from Battle Mount, Nevada, to Mt. Sterling, Kentucky, were paid at destination. In holding that the Louisville & Nashville Railway Company was the initial carrier under the statute under discussion, by reason of its issuance of the second bill of lading, the court said:

> "It does not appear that the shippers obtained any advantages in rates by virtue of the new contract. There is nothing in the circumstances to show that the transaction was a mere subterfuge or device to evade the statute. On the contrary, it appears that the parties acted in perfect good faith. It will thus be seen that the old contract was in fact abandoned, and a new contract was executed, and we find nothing in the statute that denies such power to the contracting parties. We therefore conclude that the Louisville & Nashville Rail-

road Company, by canceling the old and issuing the new contract, assumed the liability of an initial carrier, and that the trial court did not err in so holding."

The decisions quoted from, we submit, clearly control the situation in the instant case, and definitely establish the liability of respondent, as the initial carrier under the bill of lading issued by it on September 29, 1934.

Other decisions in point are:

Southern Produce Company v. *Norfolk Southern R. Co.* (Supreme Court of Appeals of Va., 1926) 132 S. E. 360;

Chase & Co. v. *Florida East Coast Ry. Co.*, (Supreme Court of Fla., 1927), 115 So. 825.

It is respectfully submitted that, in the instant case, the Court of Civil Appeals correctly held that respondent received valuable consideration for its issuance of its bill of lading, and that it could not lawfully have received any additional sum of money than the sum which it had admittedly been paid, in view of the rules and regulations of the Interstate Commerce Commission relating to the establishment of uniform rates. It is likewise submitted that the Supreme Court of Texas erred in its construction of the bills of lading involved, and in its failure to hold that respondent's bill of lading was supported by the consideration which respondent admittedly received, and in thus exempting respondent from the liability directly imposed upon it by the federal statute.

Point II.

The Instrument of September 29, 1934, issued by respondent to petitioner's agent, Fausto Trevino, is a through bill of lading to El Oro, Mexico, within the meaning of U. S. C. A. Title 49, Section 20 (11).

The document issued by respondent is on respondent's regular printed form, designated in its caption as "Uniform Straight Bill of Lading." It cites the consignment to "Mexican Light & Power Co., Ltd.", Destination "El Oro, Mexico—Route via Acambaro," which is a town in Mexico.

In view of arguments heretofore made by respondent to the effect that it was not its intention in issuing the document of September 29, 1934, to issue a through bill of lading to El Oro, Mexico, it is important that these two factors be borne in mind: (1) On September 28, 1934, the cars bearing the shipment involved were in respondent's freight yards at Laredo, Texas, to which point the shipment had moved under the Sharon bill of lading; (2) on September 29, 1934, the following day, respondent issued its bill of lading to Fausto Trevino, and thereupon transported the shipment over its line of railroad to the international boundary line on the International Bridge between Laredo, Texas and Nuevo Laredo, Mexico, where the shipment was received "by National Railways of Mexico, for further transportation to El Oro, Mexico" (R. 32); (3) absolutely nothing was said or done by respondent, at the time of its issuance of its bill of lading, or at any other time, until after this suit was filed, to indicate that it was its intention for the document to mean or constitute anything other than what it purports on its face to constitute—a through bill of lading to El Oro, Mexico, via Acambaro; (4) at the time respondent issued such document, on September 29, 1934, it had an operating agreement with the National Railways

of Mexico that upon respondent's delivery of the cars at the international boundary line, the National Railways of Mexico would receive said property and equipment on such cars (R. 45).

Not only, therefore, does the instrument of September 29, 1934, issued by respondent, on its face unequivocally route the shipment to El Oro, as the destination point via Acambaro, but as stipulated by the parties, the shipment upon its delivery by respondent to the international boundary line "was received by National Railways of Mexico for further transportation to El Oro, Mexico."

Likewise, the entire transportation from Laredo to El Oro was made under the bill of lading issued by respondent, and under no other. Respondent does not contend that any other or additional bill of lading, receipt or contract was issued by the National Railways of Mexico. The bill of lading issued by respondent was a complete and unequivocal contract for transportation from Laredo via Acambaro to El Oro.

The Supreme Court of Texas did not hold that the bill of lading sued on is not a through bill of lading, and the Court of Civil Appeals expressly held that it is. It is anticipated that respondent will again urge its argument that its bill of lading is not a through bill of lading within the meaning of the federal statute.

In this particular connection, the decisions which are most closely in point are those of the Supreme Court of Idaho in *Rice* v. *Oregon Short Line Ry. Co.*, 198 Pac. 161, and *Barrett* v. *Northern Pacific Ry. Co.*, 157 Pac. 1016, and of the Court of Appeals of Kentucky in *Louisville & Nashville Ry. Company* v. *Johnson, et al*, 206 S. W. 638, and of the Court of Civil Appeals at Galveston in the case of *Houston E. & W. T. Ry. Co.* v. *Houston Packing Company*, 221 S. W. 316 (writ of error refused).

The cases of *Rice* v. *Oregon Short Line Ry. Co* and *Louisville & Nashville Ry. Co.* v. *Johnson* have been discussed and quoted from under Point I.

In *Barrett* v. *Northern Pac. Ry. Co., supra,* the shipper delivered to the C. B. & Q. Ry. Company at Connelsville, Missouri, a stock of drugs and fixtures to be shipped from that point to Spokane, Washington. The goods were routed by the C. B. & Q. Ry. Company over its line and that of Northern Pacific Railway Company. Before the shipment reached the destination to which it had been consigned, the shipper called upon the Northern Pacific Railway Company to have the shipment forwarded, upon its arrival, to Rupert, Idaho. The Northern Pacific Railway Company thereupon altered the original bill of lading by striking out the name "Spokane" as the destination of the car and in lieu thereof inserted "Rupert, Ida." After some delay the car reached Rupert, and upon being opened, it was found that a part of the goods was missing and a large portion of the remainder was in a badly damaged condition. The suit was against the Northern Pacific Railway Company to recover damages under the federal statute invoked in the instant case.

The court held that the contract of the C. B. & Q. Railway Company was fully performed and complied with by it when the shipment reached Spokane, and that as between the shipper and the Northern Pacific Railway Company, the latter was the initial carrier under the statute under the new contract created by alteration of the original bill of lading. The court held:

> "While appellant did not issue a new bill of lading, it altered the one issued by the Chicago, Burlington & Quincy Railroad Company and adopted it as its own obligation. Even had it not done this, but had accepted the consignment upon an oral agreement to deliver it, although the act of Congress under consideration ex-

pressly requires a common carrier to issue a receipt or bill of lading for goods accepted for transportation from one state into another, it is not necessary to the right of the shipper to recover for loss of or damage to the shipment that it do so. International Watch Co. *v.* Delaware, L. & W. R. Co., 80 N. J. Law, 553, 78 Atl. 49; Thompson *v.* San Antonio & A. P. Ry. Co., 11 Tex. Civ. App. 145, 32 S. W. 427; Aton Piano Co. *v.* Chicago, M. & St. P. Ry. Co., 152 Wis. 156, 139 N. W. 743.

"The evidence discloses that appellant transferred the goods to the Oregon-Washington Railroad & Navigation Company in the yards at or near Spokane. This fact does not relieve it from the liability imposed by law. The language of the act of Congress binds a common carrier which receives property for transportation from a point in one state to a point in another state for loss or damage which results from its own negligence or from that of any common carrier over which it routes the goods without regard to the distance it may transport them. The question is, did appellant receive the goods for such a shipment? The evidence shows, conclusively, that it did. A common carrier which receives goods for interstate shipment is the initial carrier, although it only switches the car in which they are loaded to the lines of another common carrier to be transported out of the state. Aton Piano Co. *v.* Chicago, M. & St. P. R. Co., supra."

Point III

Respondent's bill of lading of September 29, 1934, is not violative of Section 6, Title 49, U. S. C. A., but is a valid legal contract.

Although the Supreme Court of Texas did not hold the instrument sued on to be invalid as violative of any subsection of Section 6, 49 U. S. C. A., and although the Court of Civil Appeals expressly held that it was not violative thereof, it is anticipated that respondent will again argue

that the contract is violative of one or another of the subsections of such statute.

The parties stipulated "that when the shipment upon which this suit is founded was made, no through railroad tariff was in effect governing such shipment from either Sharon, Pennsylvania, or from Laredo, Texas, to El Oro, Mexico, or any other point in Mexico." (R. 37). U. S. C. A. Title 49, Section 1(2), defines the transportation subject to regulation as being transportation within the geographical limits of the United States only. Thus, the Interstate Commerce Commission has no authority to establish rates or supervise methods of fixing and publicizing rates outside the territorial limits of the United States.

In *Alwine* v. *Pennsylvania R. Co.* (Sup. Court of Pennsylvania, 1940), 15 Atl. 510, the court held:

> "The courts have frequently pointed out limits to which Congress may not go in regulating movements in foreign countries. Joint through international rates are not required by law: Lewis-Simes-Jones Co. *v.* Southern Pacific Co., 283 U. S. 654, 660, 51 S. Ct. 592, 75 L. Ed. 1333. The interstate Commerce Commission can fix rates to the border but not beyond the boundaries of this country: Black Horse Tobacco Co. *v.* Illinois Cent. R. Co., 17 I. C. C. 588."

This rule is uniformly recognized, and we have found no departure therefrom by any court. Other cases recognizing and applying the rule are:

Oregon-Washington R. & Nav. Co. v. *Strauss & Co.*, (Cir. Ct. App., 9th Cir., 1934), 73 Fed. (2d) 912;
Goldberg v. *Delaware L. & W. R. Co.*, (Municipal Ct. of City of New York, 1943), 40 N. Y. S. (2d) 44;
Northwestern Oil Co., et al, v. *St. Louis-San Francisco Ry. Co., et al,* 112 I. C. C. 488;
Tennessee Extract Corp., et al, v. *Louisville & Nashville R. et al,* 128 I. C. C. 709.

As pointed out by the Court of Civil Appeals in its opinion in the instant case (R. 53), the establishment of a through rate to a point in an adjacent foreign country is not a necessary prerequisite to the issuance of a legal and binding through bill of lading to such point, and "to so hold would go far toward defeating the obvious purpose of Congress in extending in part the provisions of the Carmack Amendment to shipments from a point in the United States to a point in an adjacent foreign country, as was done by the Cummings Amendment. The Record before us does not disclose that an illegal or unauthorized rate was in any way involved." Likewise, as pointed out in the opinion of the Court of Civil Appeals, it is well settled that even if an illegal rate were involved, the contract would not be void, and recovery thereon could not be defeated.

In the case of *Judge* v. *Northern Pac. Ry. Co.*, 189 F. 1014, the United States Circuit Court of Appeals held:

> "The Interstate Commerce Commission forbids rebates, special rates, preferences, etc., and makes all agreements in reference thereto void, but it does not make the contract of affreightment otherwise void, and there is nothing in the law which will excuse the carrier from liability when it has accepted property for transportation under such a contract."

Likewise in *Adams Express Co.* v. *Darden*, 286 Fed. 61, the court, in passing upon the effect of a violation of the Transportation Act, held:

> "It is now well settled that, when a statute imposes specific penalties for its violation, where the act is not *malum in se*, and the purpose of the statute can be accomplished without declaring contracts in violation thereof illegal, the inference is that it was not the legislative intent to render such contracts illegal and unenforceable. Harris *v.* Runnels, 12 How. 79, 84, et seq., 13 L. Ed. 901; Farmers' & Mechanics' Nat. Bank *v.*

Deering, 91 U. S. 29, 35, 23 L. Ed. 196; Fritts *v.* Palmer, 132 U. S. 282, 289, 293, 10 Sup. Ct. 93, 33 L. Ed. 317; Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 545, 22 Sup. Ct. 431, 46 L. Ed. 679; Yates *v.* Jones National Bank, 206 U. S. 158, 179, 27 Sup. Ct. 638, 51 L. Ed. 1002; Dunlop *v.* Mercer (C. C. A. 8) 156 Fed. 545, 555, 86 C. C. A. 435. This rule is not in conflict with, but is an exception to, the general rule that an action cannot be maintained upon an illegal contract."

Conclusion

It is submitted that the holding of the Supreme Court of Texas in this case is not only erroneous but constitutes a dangerous precedent in exempting a carrier from the liability sought to be imposed, on considerations of public policy, by the provisions of the federal statute involved. The operation of the statute has been circumvented upon no basis which can be legally justified. Certainly, the question presented is one of general importance and concern meriting final determination by this Honorable Court.

It is respectfully submitted that this is a proper case for the issuance of a writ of certiorari, and petitioner so prays of this court.

Respectfully submitted,

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